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Nos. 17, 18, 49, 53, 54

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In the Supreme Court of the United States

October Term, 1961

Interstate Commerce Commission, Appellant

v.

J-T Transport Company, Inc., et al.

U.S.A.C. Transport Company, Inc., et al., Appellants

v.

J-T Transport Company, Inc., et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Alabama, Tennessee and Northern Railway Co., et al., Appellants

v.

Ralph L. Brooks, et al.

Interstate Commerce Commission, Appellant

v.

Ralph L. Brooks, et al.

Alabama-Tennessee Transit System, Inc., et al., Appellants

v.

Ralph L. Brooks, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 17

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

J-T TRANSPORT COMPANY, INC., ET AL.

No. 18

U.S.A.C. TRANSPORT, INC., ET AL., APPELLANTS

v.

J-T TRANSPORT COMPANY, INC., ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

No. 49

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL., APPELLANTS

v.

ELVIN L. REDDISH, ET AL.

No. 53

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ELVIN L. REDDISH, ET AL.

No. 54

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL., APPELLANTS

v.

ELVIN L. REDDISH, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court in the *J-T Transport* case (Nos. 17 and 18) (*J-T* R. 160-79)[1] is

[1] Citations to the record in the *J-T Transport* case appear as "*J-T* R. —," and to the record in the *Reddish* case as "*R* R. —."

reported at 185 F. Supp. 838; the reports of the Interstate Commerce Commission (*J–T* R. 22–27, 29–52) are printed at 74 M.C.C. 324, 79 M.C.C. 695. The opinion of the district court in the *Reddish* case (Nos. 49, 53 and 54) (*R* R. 398–410) is reported at 188 F. Supp. 160; the report of the Commission (*R* R. 386–95) is printed at 81 M.C.C. 35.

JURISDICTION

The judgment of the district court in the *J–T Transport* case (*J–T* R. 159) was entered on August 9, 1960. Timely notices of appeal (*id.* at 180–83, 184–85) were filed and probable jurisdiction was noted on February 20, 1961 (*id.* at 186; 365 U.S. 808). The judgment of the district court in the *Reddish* case (R R. 411–12) was entered on October 19, 1960. Timely notices of appeal (*id.* at 412–15, 416–18, 418–20) were filed, probable jurisdiction was noted on April 17, 1961 (*id.* at 421; 365 U.S. 877), and the cause was set for argument immediately following the *J–T Transport* case (*R* R. 421). The jurisdiction of this Court to review these final judgments is conferred by 28 U.S.C. 1253.

STATUTE INVOLVED

The pertinent statutory provisions, the National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding 301, and Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 303(a)(15), 309(b), are set forth in the Appendix, *infra*, at pp. 61–64.

QUESTIONS PRESENTED

Section 209(b) of the Interstate Commerce Act provides that the Commission, in passing upon applications for contract motor carrier permits, must consider a number of factors, including "the effect which granting the permit would have upon the services of the protesting carriers" and "the effect which denying the permit would have upon the applicant and/or its shipper." These cases present the questions:

1. Whether the Commission may consider the "adequacy of existing service" provided by protesting common carriers, or their ability and willingness to provide a proposed service, in weighing the effects on shippers of denying, and on the services of protesting carriers of granting, the permit.

2. Whether in determining the "adequacy of existing service" the Commission (a) has placed an improper burden of proof upon the applicant and supporting shippers by requiring them to establish the inadequacy of the service offered by the existing carriers, and (b) has taken an unduly narrow view of "adequacy" that fails to consider the "distinct need of each individual customer."

3. Whether the Commission may presume that loss of actual or potential traffic by protesting common carriers to the applicant for a contract carrier permit will have an adverse effect upon services which the common carriers render the public.

In addition, the *Reddish* case presents a separate question:

4. Whether the Commission's refusal to consider the ability of the applicant to render a proposed service for the supporting shippers at lower cost than that offered by the existing carriers contravenes either the command of the National Transportation Policy that the Act be so administered as to promote economical and efficient service or the statutory requirement that the Commission consider the effect on the shipper of denying the permit.

STATEMENT

These are direct appeals from final judgments by three-judge district courts setting aside orders of the Interstate Commerce Commission. In each case, the Commission denied the applicant a permit to engage in contract motor carriage. In the *J–T Transport* case (Nos. 17, 18), the United States supported the order of the Commission before the district court, but has now concluded, after further analysis of the issues, that the order was erroneous. In the *Reddish* case (Nos. 49, 53, 54), the United States admitted error (see *R* R. 15, 399) and still adheres to that position.

THE J–T TRANSPORT CASE

The administrative proceedings.—On March 14, 1957, the J–T Transport Co., Inc., filed an application to extend its present operations as an irregular-route contract carrier of airplane parts by motor vehicle to the carriage of aircraft landing gear bulkheads on behalf of Boeing Aircraft Company from their supplier in Indianapolis, Indiana to Boeing's

Wichita, Kansas, plant. Hearings on the application were held before an examiner. Boeing supported the application, but several motor common carriers appeared as protestants. The principal protesting carrier, U.S.A.C. Transport, Inc., is a highly specialized irregular-route transporter of airplane parts. U.S.A.C. made a showing of its capabilities and demonstrated that it could render a service substantially identical to that proposed by J–T Transport. (*J–T* R. 33–34, 36, 110–24.) Boeing indicated that it had not sought to secure the proposed service from U.S.A.C. because of unsatisfactory damage experience with that carrier in 1953 (*id.* at 33, 101), and Boeing's witness expressed the belief that contract carriage was more practicable for Boeing than common carriage, because a contract carrier's operations could be more readily integrated with the manufacturer's production, thereby insuring necessary reductions in transit time (*id.* at 86, 90–91, 161).

The examiner filed a report on July 18, 1957, recommending grant of the permit. (*J–T* R. 16–20.) In its order of January 31, 1958, Division 1 of the Commission adopted the examiner's findings of fact (*id.* at 24) but denied the application. It found that, since "no attempt whatsoever has been shown to have been made to ascertain if the existing service is capable of meeting the needs of the supporting shippers," the applicant had not established a "need" for contract service; and a "service not needed cannot be found consistent with the public interest or the national transportation policy" (*id.* at 26–27).

On petition for reconsideration, the full Commission on June 15, 1959, denied the application (*id.* at 29–53).

The Commission's report.—The Commission reviewed the background of the 1957 amendments to the Interstate Commerce Act, by which Congress amended the definition of contract carriage and specified five criteria for the Commission to take into account in passing on applications for contract carrier permits (*J–T* R. 35–44).[2] It concluded that Congress did not intend "the abandonment of our long continued practice of considering the adequacy of existing common * * * carrier service in determining whether a need has been established for a proposed contract carrier operation * * *," and that, in view of the Commission's "past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted," there is "a presumption that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before" (*id.* at 41–42).

Turning to the application before it, the Commission found that J–T Transport's proposed operations came within the new definition of contract carriage

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[2] The statute as amended is set forth in the Appendix at pp. 62–64, *infra*. The five criteria are (1) number of shippers to be served, (2) nature of the service proposed, (3) effect of a grant on protesting carriers' services, (4) effect of a denial on applicant and/or its shippers, and (5) changing character of shipper's requirements.

(*id.* at 45), and it then considered each of the five new statutory criteria (*id.* at 45–48). It found the applicant qualified in terms of the number of shippers to be served and of the nature of the service proposed; it found that the applicant would not be adversely affected by a denial of the grant nor, since "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C.," would the supporting shipper (*id.* at 45, 46–47). Finally, applying the presumption it had already announced, the Commission concluded that, "in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed * * * a grant of authority to applicant would have an adverse effect upon that protestant" (*id.* at 45–46).[3]

The court proceedings.—The present action was instituted by J–T Transport on August 21, 1959, in the Western District of Missouri (*J–T* R. 1), and the three-judge district court rendered its decision, setting aside the Commission's orders and remanding the case to the Commission for further proceedings, on August 9, 1960 (*id.* at 160–79). After reviewing the legislative background of the 1957 amendments, the court concluded that, in considering the ability and willingness of existing common carriers to handle the traffic in question—a factor which was originally proposed by the Commission for inclusion in the statute but then withdrawn and not adopted by Congress—the

[3] The fifth statutory criterion was found inapplicable (*J–T* R. 47–48).

Commission had injected a "sixth criterion, specifically rejected by Congress," and had therefore erred (*id.* at 173).

The court went on to find that the Commission had erred in imposing upon the applicant the burden of showing that existing services were inadequate (*id.* at 174). It further found that the Commission had considered the shipper's needs only in terms of "*reasonable transportation needs*" rather than in terms of the "*distinct* or *specific* need of the supporting shipper," and that this was error (*id.* at 177). Finally, it ruled that the Commission had erred in allowing the existence of willing and able common carriers to govern the decision of the case by applying a presumption that such carriers would be injured if denied the traffic in question (*id.* at 174–76). In so holding, the court especially noted that the record showed no actual adverse impact upon the "services" of U.S.A.C. by virtue of the grant and that such injury seemed unlikely since U.S.A.C. had never handled the traffic in question (*id.* at 176–77).

THE REDDISH CASE

The administrative proceedings.—Elvin L. Reddish filed an application on May 13, 1958, for a permit to carry canned goods by motor vehicle as a contract carrier from three points in Arkansas and one point in Oklahoma to various points in thirty-three states

(*R* R. 23–36).[4] At the hearing on this application he was supported by his three prospective shippers and opposed by various motor and rail common carriers (*id.* at 366, 368). According to the record, Reddish's service on behalf of his shippers was to be in the transport of canned fruits and vegetables to those wholesaler and retailer customers of the shippers ordering goods in less-than-truckload amounts (*id.* at 370–71, 390, 393). Because the low profit margin in the canned-goods business causes these customers (especially the smaller ones) to maintain low inventories (*id.* at 371, 389, 391), they require expedited deliveries in small quantities and on short notice (*id.* at 126–27, 148–49, 371). In addition, many of them will accept deliveries only at specified hours on certain days (*id.* at 128, 178, 245). The type of operation involved requires considerable integration and coordination between shipper and carrier; indeed, most of the shippers' competitors rely on unregulated private carriage (*i.e.*, trucks which they own and operate) for the shipment of their goods (*id.* at 147–48, 195,

[4] The applicant also requested authority to transport materials and supplies needed by his contracting shippers back to their plants on the return trips from outbound deliveries. This authority was denied by the Commission, and, as we understand the basis of the lower court's vacation of the order, the agency's inbound service determination is unaffected. We believe, therefore, that this issue is not involved in the case at this stage of the proceedings.

371), as did the principal supporting shipper (Steele) for the bulk of its shipments until a strike at its plants reduced its private carrier fleet (*id.* at 370–72, 389–90).

The shippers indicated that common carriage would not satisfy the great bulk of their service needs. In order to avoid hauling goods in a partly empty truck, the traffic must be carried in consolidated loads of shipments bound for various customers, frequently in scattered locations (*R* R. 116, 128–29, 190, 194); often the available common carriers cannot consolidate the separate shipments because they are not authorized to deliver to all of the points at which the shippers have customers (*id.* at 190, 194). Moreover, consolidating loads requires careful scheduling upon short notice (*id.* at 107, 128–129, 131). Because of their lack of authority, common carriers must frequently "interline" the traffic (*i.e.*, unload it and reload it on another carrier); this causes substantial delays (*id.* at 194, 198), increases the likelihood of damage to the goods (*id.* at 373) and often results in misconsignment of particular shipments (*id.* at 198–99). Furthermore, the shippers testified that because the cost of common carriage was "prohibitive" for less-than-truckload shipments, they would use private carriage for such shipments if Reddish's contract carrier application were denied (*id.* at 173; see also *id.* at 390).

The protesting motor common carriers testified generally as to their ability to furnish service to the shippers (*id.* at 375–81); they indicated that they could provide multiple pickup and delivery services to

most of the points involved by interlining and that they could provide adequate less-than-truckload service (*id.* at 382, 391–93; see also, *e.g.*, *id.* at 281–85, 289–300).

The examiner concluded that the proposed contract-carrier service "will be more responsive to shipper's transportation requirements" than would common carriage and that the grant would not have "any material adverse effect upon the operations of any other carrier" (*id.* at 382); accordingly he recommended granting the application (*id.* at 384). On review, Division 1 of the Commission, although adopting the examiner's statement of the facts as its own (*id.* at 388), denied the application (*id.* at 385–95), and a petition for reconsideration was denied by the full Commission (*id.* at 396–98).

The Commission report.—The Commission[5] found that applicant came within the new congressional definition of "contract carrier" and that it qualified in terms of the number of shippers sought to be served (*R* R. 393). As to the nature of the proposed operation, the Commission found that the service needed by the shippers "could be performed by protesting common carriers as well as by applicant" (*ibid.*). Citing its decision in the *J–T Transport* case, *supra,* the Commission summarily concluded that the services of the common carriers would therefore be adversely affected by the grant (*id.* at 394).

[5] In the Report of Division 1, which is the Commission's Report in this case.

The Commission found that, since the applicant was "a new entrant into the field of motor transportation," denial of the application would not affect him adversely (*ibid.*). With respect to the effect upon the shippers of a denial, the Commission recognized that the common carriers "may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries"; however, it concluded that, in view of the shippers' insufficiently "positive showing" that existing service would not meet their "reasonable transportation needs," they would not be adversely affected by a denial (*id.* at 394–95). The Commission also noted its view that the shippers' desire to obtain lower rates for their less-than-truckload traffic was the primary, if not sole, reason for their support of the application, but held that "[t]his is not a sufficient basis to justify a grant of authority to a new carrier" (*id.* at 395).*

The court proceedings.—The present action was instituted by Reddish on January 27, 1960, in the Western District of Arkansas (*R* R. 1). A three-judge district court rendered a decision setting aside the Commission's order and remanding the case to the Commission for further proceedings (*R* R. 398). Primarily on the basis of the *J–T Transport* decision in the Western District of Missouri, *supra*, the court concluded that, in considering the adequacy of the service proposed by existing common carriers, the

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*As in the *J–T Transport* case, the Commission found the fifth statutory criterion inapplicable (*ibid.*).

Commission had employed a criterion "which Congress deemed improper" (*id.* at 406–09). The court also found that the Commission's presumption that existing common carriers would be injured by the loss of potential traffic was overcome by the evidence of record that the shippers would use private carriage if the application were denied (*id.* at 410).

In addition, the court ruled that the record did not support the Commission's finding that shippers would not be adversely affected by a denial of the grant; it found the record clear that "the alternative faced by the shippers if the application is denied is the operation of their own trucks, in substantial numbers, in private carriage; common carriers are not an adequate substitute, and for that reason are not utilized" (*id.* at 405–06). Again relying on the *J–T Transport* decision, the court also indicated that the Commission had used an improper test to evaluate the effect of denial upon shippers when it considered only the "reasonable" transportation needs of the shippers rather than their actual and distinct needs (*id.* at 410).

Finally, the court held that the Commission had erred in refusing to consider the lower rates available from contract carriage in determining the effect of denying the application upon the shippers (*id.* at 409). On the basis of the directive of the National Transportation Policy to promote "economical" service, the court found that "where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including

the lower rates * * * the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers" (*ibid.*).

SUMMARY OF ARGUMENT

The 1957 amendments to Section 209(b) of the Interstate Commerce Act provide that the Interstate Commerce Commission, in passing upon applications for contract carrier authorizations, is to take into account (in light of the public interest and the National Transportation Policy) a number of specified factors. Among these are "the effect which granting the permit would have upon the services of the protesting carriers" and "the effect which denying the permit would have upon the applicant and/or its shipper." These cases present a number of questions as to the standards and procedures to be employed by the Commission in applying these statutory criteria to individual applications.

I

Although the district court opinions are not altogether clear on this point, it appears that both courts may have held that the Commission is precluded from giving any consideration at all to the ability and willingness of existing common carriers to perform the service proposed by the contract carrier applicant. If this was the ruling, we submit that it was error. The adequacy of existing common carrier service must necessarily be an important factor—indeed, it will often be the most important factor—in determining contract carrier applications, for it provides the

primary basis for evaluating the effects on shippers of denying, and on the services of common carriers of granting, the proposed permit.

The legislative history of the 1957 amendments establishes no more than that the adequacy of existing service must not become an automatically conclusive factor in contract carrier cases. The failure of Congress to enact the amendments proposed by the Commission that would have made this factor conclusive stemmed largely from concern lest too heavy a burden of proof be imposed upon contract carrier applicants and entry into the field be too severely restricted. The fact that the Commission and both the common and contract carriers supported the amendments as finally passed is clear evidence that they were not intended to preclude the Commission from taking into account the ability and willingness of existing common carriers to perform the proposed services.

II

On the theory that the regulation of contract carriage is for the purpose of protecting common carriers, the Commission has approached the consideration of contract carrier applications in such a way as to make denial virtually automatic whenever it finds that one or more common carriers are willing and able to render the service. It is this approach that is at the heart of three challenges to the Commission's actions in the present cases: that it required applicants or their supporting shippers to prove the inadequacy of existing service, that it used an improper measure for determining the adequacy of existing service, and that it employed an unjustified pre-

sumption in determining the effect of granting a permit upon existing common carriers.

A. Common sense and the legislative history of the 1957 amendments clearly establish that the burden of showing the capability of existing common carriers to perform the proposed service is upon the protesting common carriers. The Commission fully recognizes the rule. It is contended, however, that the Commission improperly assigned that burden to the applicant or its supporting shippers in both of the present cases. While some of its statements in the *J–T Transport* case might suggest that it had imposed the burden on the applicant, the Commission's opinion taken as a whole indicates that it found the principal protesting common carrier willing and able to perform the proposed service on the basis of the record as a whole. In the *Reddish* case, however, the Commission's opinion does provide a substantial basis for concluding that the Commission improperly required the supporting shippers to prove that the existing common carriers had been tried and found unable to perform the distinct services on which the contract carrier application was based.

B. Section 203(a)(15) of the Act, as amended by the 1957 amendments, defines contract carriage in terms of a response to "the distinct need of each individual customer." It is contended that the Commission in these cases erroneously appraised the effect on shippers of denying the applications by limiting its inquiry to the question whether existing common carrier service was "reasonably" adequate

or was able to meet the shippers' "reasonable" needs. The Commission does not seem to have committed such an error in the *J–T Transport* case, where the record taken as a whole indicated an ability on the part of the protesting common carrier to meet the actual needs of the shipper. However, in the *Reddish* case, the Commission recognized that the common carriers would not be able fully to satisfy the transportation needs established by the shippers; it avoided weighing this deficiency against any actual effect the grant of a permit might have upon the protesting common carriers by concluding, erroneously, we submit, that the shippers must be satisfied with "reasonably" adequate service.

C. In both cases, the Commission, having found the existing common carriers willing and able to provide the service proposed by the applicant for a contract carrier permit, applied a presumption that the services of the common carriers would be adversely affected by the grant of the application; in each case, this conclusion was the primary basis for denying the application. The legislative history of the 1957 amendments clearly negates any notion either that ability and willingness of existing carriers might thus become conclusive, or that any one of the five criteria set forth in Section 209(b) might be given decisive force by means of a conclusive presumption unrelated to established facts.

This does not mean, of course, that considerable weight may not be given to the existence of able and willing common carriers and to the impact that granting a permit might have upon them, even in terms of potential traffic. However, that impact must be determined in the light of the facts of each particular

case, with the aid of such expertise as the Commission may properly draw upon, and the impact must be balanced against the consequences that would stem from failure to grant the permit. The Commission must consider such facts as, for example, that the shippers will not utilize the services of common carriers even if the contract carrier application is denied. Having weighed all of the relevant factors, the Commission may, indeed, arrive at general conclusions as to the balance it will strike in evaluating similar contract carrier applications in the future; however, these conclusions must be based on established facts relating to the motor transportation industry, not on a presumption, and the Commission must consider the circumstances in each new case to see whether the evidence upon any factor is sufficient to warrant a departure from the general rule.

III

In the *Reddish* case, there was substantial evidence to the effect that the contract carrier applicant could, by virtue of economies and efficiencies inherent in his operations, and would, offer lower rates to the supporting shippers than were available from common carriers. The Commission refused to consider this evidence in appraising the effect that denial of the contract carrier application would have upon the shippers. The district court found this to have been error, and we agree.

A. The directive of the National Transportation Policy, that the Commission recognize the "inherent advantages" of each form of transportation and that

it promote "economical and efficient service," and the requirement of Section 209(b) that the Commission consider the effect of a permit denial upon the supporting shippers, clearly indicate that the Commission must give due weight to rate advantages offered by contract carrier applicants. While it may not be bound to do so when such advantages stem from mere profit-shaving, it must plainly do so when the advantages are shown to result from efficiencies and economies inherent in the nature of the contract carrier's operations. Shippers cannot be forced to resort to separate proceedings attacking the justness and reasonableness of common carrier rates in order to obtain such advantages, nor will Commission consideration of such advantages turn the proceedings upon contract carrier applications into massive rate cases.

B. Moreover, the record in the *Reddish* case did in fact establish that the rate advantages offered by the applicant stemmed from economies and efficiencies inherent in the type of contract carriage proposed. Most significantly, evidence as to economic advantages resulting from load consolidation, elimination of interlining and lack of terminal costs would, unless rebutted, have precluded a finding (had the Commission reached the issue) that the proposed rate advantages were not the result of such inherent economies and efficiencies.

ARGUMENT

INTRODUCTION

These cases present a series of interrelated issues as to the standards to be applied by the Interstate Commerce Commission in passing upon applications

for contract carrier authorizations in the light of the amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act adopted by Congress in 1957. Both cases raise an issue as to the extent to which the Commission may consider the adequacy of existing service or the ability and willingness of existing carriers to provide the service proposed by the applicant, in complying with the statutory mandate to consider the effects on shippers of denying, and on the services of protesting carriers of granting the proposed permit. Both cases also present issues as to who has the burden of establishing the capabilities of the existing carriers, and what standards the Commission is to apply in determining the effect of denial upon shippers and of a grant upon the protesting carriers. In addition, the *Reddish* case (Nos. 49, 53, and 54) presents a separate question—whether the Commission, in determining the effect of denial of a contract carrier application upon the proposed shipper, may refuse to give any consideration to a contention that the applicant proposes to provide services at lower rates than the protesting common carriers.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), prescribes the standards the Commission is to apply in passing upon applications for contract carrier permits. It provides that a permit "shall be issued to any qualified applicant" who is "fit, willing, and able" to perform contract carrier services and to conform to the Act and Commission regulations, where the proposed operation "will be consistent with the public interest and the national transportation policy declared in this Act". By

amendment in 1957, 71 Stat. 411, there was added to this general test a provision declaring that

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the permit would have upon the services of the protesting carriers [4] and the effect which denying the permit would have upon the applicant and/or its shipper [5] and the changing character of that shipper's requirements. [Numbers added for the Court's convenience.]

In both the *J–T Transport* and *Reddish* cases the Commission found the applicants qualified to operate as contract carriers both with respect to the number of shippers to be served and the nature of the operation,[7] and to conform generally to the definition of contract carrier set out in Section 203(a)(15) of the Act, 49 U.S.C. 303(a)(15). The Commission, however, denied the applications on the ground that the available common carrier service that the protesting carriers were able and willing to provide to the proposed shippers was adequate to meet their needs. Holding that there would therefore be no adverse

[7] The Commission's brief in the *Reddish* case appears to suggest (pp. 18–21) that the Commission had found the proposed service there not properly classifiable as contract carriage. It is clear, however, that the Commission, in the passage cited in the brief, concluded only that "the service proposed and shown to be needed could be performed by protesting common carriers as well as by applicant" (*R* R. 393).

effect upon the shippers by a denial of the application but that a grant would necessarily adversely affect the services of the protesting carriers, the Commission concluded that a grant of the application would be inconsistent with the public interest and the National Transportation Policy.[8]

The district courts reversed in both cases. In both they appear to have held that the Commission, in considering whether existing common carriers were willing and able to provide the proposed service, had injected into the statutory standards for passing upon such applications an improper "sixth criterion" that had been proposed by the Commission itself at the time of the 1957 amendments to Section 209 but had subsequently been withdrawn (*J–T* R. 173; *R* R. 407–08). The courts also held that the Commission in both cases had improperly imposed upon the applicants or their supporting shippers the burden of showing the inadequacy of common carrier facilities to meet the needs of the shippers (*J–T* R. 177; *R* R. 406); that the record in each instance failed to support the Commission's conclusion that the needs of the shippers could in fact be met by existing carriers (*J–T* R. 177; *R* R. 405–06, 408) and that, to the extent the

[8] The Commission in both cases also concluded that a denial would have no adverse effect upon the contract carrier applicant, see p. 28, *infra*. The Commission also indicated (*J–T* R. 47–48; *R* R. 395) that the factor relating to changing shipper conditions comes into play only where a shipper already provided with a full line of transportation services by a contract carrier expands its operations and requires new services, or where future shipper requirements indicate that common carrier facilities will become inadequate.

Commission had based this determination upon a finding that such needs could be "reasonably" met, the Commission had applied an improper standard (*J–T* R. 176–177; *R* R. 410); and that the Commission, in determining that protesting carriers would necessarily be adversely affected by a grant of the applications, had improperly applied a conclusive presumption for which there was no support in the record (*J–T* R. 170, 176; *R* R. 410). In addition, in the *Reddish* case the court held that the Commission had erred in failing to give any consideration whatsoever to the claim that grant of the application there would provide shippers with transportation at lower rates than the protesting common carriers could or did offer (*R* R. 409).

The United States takes the position that both the courts below erred insofar as they held that the Commission is precluded from giving any consideration to the existing common carrier's ability and willingness to provide the service proposed by a contract carrier applicant. We believe that the district court in the *J–T Transport* case erred in concluding that the Commission imposed upon the applicant the burden of demonstrating the service capabilities of the common carriers, and in holding that the record failed to support the Commission's finding that the shippers' needs could be met by the protesting common carrier. We submit, however, that the Commission's decisions in both cases are invalid because, as the district courts found, the Commission reached its crucial conclusion that the existing carriers would be adversely affected by grant of the applications upon

the basis of an improper presumption unrelated to the facts of record. In our view the Commission's order in the *Reddish* case is invalid for the additional reasons that the Commission appears improperly to have imposed on the supporting shippers the burden of establishing the inadequacy of existing service, and that the Commission failed to give appropriate consideration to the needs that those shippers had demonstrated on the record, particularly their needs for transportation of less-than-truckload quantities at rates lower than the existing common carriers would offer.

I

THE ALLEGED ERROR IN THE COMMISSION'S GIVING ANY CONSIDERATION TO "ADEQUACY OF EXISTING SERVICE"

While it is not altogether clear, each of the courts below appears to have held that the Commission may not, in passing upon applications for contract carrier permits, even consider the adequacy of existing common carrier service or (what is in essence the same thing for these purposes) the ability and willingness of protesting common carriers to perform the service proposed by the applicant. If this was the ruling, it was error. We agree with the Commission that such consideration is not barred by anything in the Interstate Commerce Act, the 1957 amendments thereto, or their legislative history. On the contrary, this consideration, upon a proper record, may constitute the primary basis for evaluating the effect of a grant or denial of a contract carrier application

upon the protesting carriers and proposed shippers, respectively.

As the Commission points out in its brief in No. 17 (at p. 29), application of the governing standards set forth in amended Section 209(b) necessarily requires consideration of the adequacy of existing common carrier service. Plainly enough, the Commission cannot evaluate "[3] the effect which granting the permit would have upon the services of the protesting carriers" unless it determines whether the protesting carriers are willing and able to handle the traffic in question, for there will be no "effect" unless they are so willing and able. Similarly, in order to know "[4] the effect which denying the permit would have upon the * * * shipper," the Commission must determine the adequacy of the common carrier service that would be available to the shipper in the event of a denial. There is absolutely nothing in the wording of the statute or in the legislative background of the 1957 amendments to suggest that the Commission was to leave out of account the most important factual element in considering these two statutory criteria.

The most that the language and legislative history of the 1957 amendments establish is that the Commission cannot deny a contract carrier application solely because common carriers are willing and able to furnish the proposed service, without regard to the other statutory criteria (see pp. 40–42, *infra*). As the Commission fully explains in Point I(C) of its brief in No. 17 (at pp. 28–45), it originally proposed an amendment to section 209(b) that would have re-

quired contract carrier applicants to show "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." One of the principal reasons for the deletion of the amendment was the common recognition of the unfair, if not impossible, burden of proof that such a requirement would impose upon contract carrier applicants. Similarly, the deletion of the Commission's proposed amendment to the Section 203(a)(15) definition of a contract carrier, which would have limited such carriers to the furnishing of special or individual transportation services "not provided by common carriers," stemmed in large part from a concern that, since many common carriers are authorized to provide highly specialized services for individual shippers, its inclusion might virtually preclude any new grants or extensions of existing permits. See *Surface Transportation—Scope of Authority of I.C.C.*, Hearings before a Subcommittee of the Senate Interstate & Foreign Commerce Committee, 85th Cong., 1st Sess., 43–44, 295–96, 301–03 (hereinafter cited as "Hearings").

The 1957 amendments were indisputably the result of compromise among the competing interests that were represented in the congressional hearings. As the bill was finally passed, it had the support not only of the Commission but of both the Common and Contract Carrier Conferences of the American Trucking Association (S. Rep. No. 703, 85th Cong., 1st Sess., 6, 7; H. Rep. No. 970, 85th Cong., 1st Sess., 2; 103 Cong. Rec. 14036). It is inconceivable that if there had been any basis whatever for supposing that avail-

ability of existing common carrier service would no longer be open for consideration in contract carrier permit cases, either the Commission or the Common Carrier Conference—who entered the hearings intending to make that factor decisive—would have lent their support to these amendments. In short, there is literally nothing about this legislation—nothing in the circumstances that give rise to its enactment, nothing in the congressional background, nothing in its plain language—that yields the slightest suggestion that the Commission was henceforth to be precluded from giving due weight to the adequacy of existing common carrier service or to the willingness and ability of those carriers to provide the service proposed.

II

THE ALLEGED ERRORS IN THE COMMISSION'S APPLICATION OF THE STATUTORY CRITERIA FOR DETERMINING CONTRACT CARRIER APPLICATIONS

The difficulties that the United States finds with the Commission's decisions in these cases lie not in whether the Commission may consider the adequacy of existing common carrier service or the common carriers' ability and willingness to provide a proposed service, but in the manner in which it considered them. The Commission's position on this question is quite clear. Regulation of contract carriage, it asserts, is largely, if not entirely, based upon the need for protecting common carriers; therefore it has determined that whenever such carriers are willing and able to perform a service for which shippers have

shown a need, a contract carrier application to provide the service should be denied (*J–T* R. 38, 41–42).

Reflected in terms of its post-1957 consideration of contract carrier applications under the five tests newly set out in Section 209(b), this position means that if an applicant surmounts the first two hurdles—*i.e.*, proposes a sufficiently limited number of contracts and a service that can properly be classified as contract carriage—he will nevertheless fail if the existing common carrier service is found to be adequate or if the common carriers are willing and able to provide the proposed service. In such situations, the Commission will conclude that a denial will have no adverse effect upon the shipper whereas a grant would adversely affect the protesting carriers. The only possible qualifications to this rule would be where highly exceptional circumstances existed indicating that a denial would seriously injure the applicant contract carrier[*] or that the changing needs of the shippers warranted a departure from the norm.

We believe that this position, which makes adequacy of existing common carrier service wholly determinative in virtually every case, was of doubtful

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[*] Where, as in the *Reddish* case, the contract carrier applicant is not yet a permittee, the Commission holds that, for this reason, a denial "could not be said to affect him adversely" (*R* R. 394). Where he is an existing permittee, as in the *J–T Transport* case, the Commission appears to hold that a denial would leave him no worse off than he was before (see *J–T* R. 46). Conceivably, however, the Commission might find differently where, for example, an existing contract carrier has lost one account and, in seeking another, demonstrates that the revenues therefrom are essential to its continuing ability to serve other shippers.

validity under the original language of Section 209, and is clearly inconsistent with the action which Congress took, and refused to take, at the time of the 1957 amendments. We agree with the Commission that a major reason for bringing contract carriage under federal regulation was the necessity for protecting the common carriers upon whom smaller shippers are forced to rely. We further agree that in conformity with this objective—embodied in the general concept of the public interest and the specific statement of the National Transportation Policy against which Section 209 specifies all contract carrier applications are to be tested—the Commission was authorized, and in fact commanded, to give great weight to circumstances of record indicating that a grant would jeopardize actual or even potential common carrier service. But the achievement of this objective cannot, in our opinion, justify the mechanistic approach to the problem that has been adopted by the Commission.

There are at least three specific areas, each in issue in both the *J–T Transport* and *Reddish* cases, where the Commission's method of applying the valid underlying policy of protecting common carriers has been challenged. They involve questions as to (1) who has the burden of establishing the capacity of existing common carriers to perform the services the contract applicant proposes to provide to particular shippers, (2) what is the measure of adequacy that would justify a finding that a shipper's "distinct" needs can be met by the common carriers, and (3) in what circumstances can the Commission properly find that

the common carriers would be adversely affected by granting the application. We discuss them in turn.

A. *The burden of establishing "adequacy of existing service."*—Since the facts as to the capabilities of the common carriers lie peculiarly within their own knowledge, rather than with the contract carrier applicant or his shipper, common sense would indicate that the former should assume the burden of making a record as to their willingness and ability to provide the service for which a need has been shown. See 9 Wigmore, *Evidence,* § 2486 (3d ed. 1940. In any event, this question would appear to have been definitively settled by the action of the Congress in 1957 in deleting the proposed amendment to Section 209(b) that would have placed the burden on the applicant. See *supra,* pp. 25–26. Indeed, the Commission does not deny that the protesting common carriers have the burden of proof on this point (see Commission's brief in No. 17, pp. 43–44, 49). However, in both cases the lower courts appear to have found that the Commission *in fact* placed the burden on the applicant (see *J–T* R. 177; *R* R. 406).

In the *J–T Transport* case this conclusion appears to rest upon language in the Commission's report in which, after describing the capabilities of the protesting common carrier, U.S.A.C. Transport, Inc., the Commission states "we cannot find that existing service has been shown to be inadequate" (*J–T* R. 47).. While this statement considered by itself might raise doubt as to the Commission's intent, we agree with the Commission that the decision as a whole need not be so interpreted. For in the *J–T Trans-*

port case the protesting carrier did in fact make a detailed showing of its capabilities (see *J–T* R. 110–124). Moreover, the Commission's subsequent findings that "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C." (*J–T* R. 47), that "the very business of U.S.A.C. is the transportation of the type of traffic involved" (*ibid.*) and that "U.S.A.C. is fully able to meet the shipper's needs" (*id.* at 49), appear adequate to constitute a determination, based upon the protestants' showing, that its service could meet the shipper's needs.

In the *Reddish* case, it is somewhat difficult to determine the precise manner in which the Commission assigned the burden of establishing the capabilities of existing common carriers to provide the needed service. A careful reading of the Commission's opinion suggests that what the Commission did was to conclude, on consideration of the evidence, that the protesting carriers had an overall capability of satisfying the general kinds of needs established by the shippers:[16]

> The service required by the shippers does not seem to be in any way different from that which motor common carriers are rendering daily to countless other shippers of the same or similar commodities. * * * [*R* R. 393.]

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[16] And it was this "finding" that apparently brought into play the presumption that the protesting carriers would, therefore, be injured by a grant of the application (*R* R. 394). See pp. 39–46, *infra*.

The Commission then went on to recognize that in some respects the protesting carriers might have some difficulty in providing service of the precise character and quality required by the shippers (*id.* at 394). It concluded, however, that since the shippers had not actually used the common carriers, they had not established that "reasonably adequate" common carrier service was unavailable:

> [T]he supporting shippers have failed to show that they have been unable to obtain reasonably adequate service upon request. * * * In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application. [*R* R. 394.]

Two errors seem apparent from these statements of the Commission taken in the foregoing context. The first, that the Commission, in limiting its consideration to merely "reasonably" adequate service to meet "reasonable" transportation needs, employed an improper standard for determining the distinct needs of the shipper, is discussed at pp. 33–39, *infra*. Secondly, at the very least, the Commission seems to have required the shippers to assume the burden of establishing the inability of existing common carriers to provide something better than "reasonably adequate service." We submit that this is error, for, as we shall discuss in more detail in the following section, it is "the distinct need of each individual customer"

(Section 203(a)(15)) that is at issue in a contract carrier application. The burden on the protesting carriers of establishing their own ability and willingness to satisfy the "need" in question must be in the statutory terms. The Commission aggravated the error by holding that the shippers had the burden of demonstrating the contrary by actually employing common carriers for some indefinite test period, notwithstanding the shippers' undisputed testimony that they could not afford the "prohibitive" costs of doing so (*R* R. 173).

B. *The terms in which the shippers' "needs" are to be established.*—In the *J–T Transport* decision the Commission, in enunciating the principles governing its consideration of applications for contract carrier permits opposed by common carriers, states (*J–T* R. 38) that "the decisive factor [has been] whether the available common carrier service was *reasonably* adequate to meet the transportation needs involved." (Emphasis supplied.) Similarly, as we have noted above, in the *Reddish* case the Commission articulated its view of cognizable shipper needs as "reasonable transportation needs" that could be satisfied by "reasonably adequate service" (*R* R. 394). In reversing both decisions, the courts below pointed out that Section 203(a)(15) of the Act defines contract carriage in terms of the ability of the carrier to cater to the "distinct need of each individual customer" (*J–T* R. 177; *R* R. 410), and held that to the extent the Commission finds no adverse effect upon a shipper because common carriers can provide a "reasonably adequate"

service meeting many, but not necessarily all of their proven needs, it acts improperly (*ibid.*).

The issue thus presented is no mere play on words. Cf. *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95. For in most instances the determination of whether a contract carrier application should be granted or denied resolves itself into weighing the needs of the shipper against the adverse effects upon the common carriers. It may well be that in a given case the reasons for a particular shipper's wishing to use contract carriage will be so insubstantial as to be easily outweighed by almost any public interest factor pointing the other way. But the statute requires a balancing of these competing interests, and the Commission cannot read the significant element of individual shipper need out of the equation by treating merely "reasonably adequate" service as completely meeting those needs.

As the courts below held, the notion that shipper needs can be adjudged by any such generalized objective standard as that adopted by the Commission is flatly negated by the 1957 amendment to Section 203 (a)(15) by which Congress defined contract carriage in terms of "transportation services designed to meet the distinct need of each individual customer." Moreover, this Court has itself rejected similar Commission reliance on the protesting carriers' ability to provide shippers with "reasonably adequate" service. In *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 90, the Court held that proposed motor carrier service could not be evaluated (as the Commis-

sion had there evaluated it) on the basis that existing service was "reasonably adequate"; rather, the "'relative or comparative adequacy' of the existing service"—*i.e.*, the relative responsiveness of the competing forms of transportation to the transportation needs actually involved—"is the significant consideration when the interests of competition are being reconciled with the policy of maintaining a sound transportation system."[11] So here, it is the "relative or comparative" responsiveness of the common and contract carriers to the distinct needs of the supporting shipper, and not the common carrier's ability to provide "reasonably adequate" service,[12] that must

[11] In the *Schaffer* case, the Court was concerned with the conflict between an application for common carrier motor transport authority and existing rail carriers, and the decision talks in terms of giving weight to the command of the National Transportation Policy that the Commission administer the Act with due regard to the "inherent advantages" of different modes of transportation. But regardless of whether common and contract motor carriage can be classified as constituting different "modes" of transportation, see p. 49, *infra*, it seems clear that the express directive that Congress wrote into Section 209(b) of the Act, that the Commission consider the effect of a denial of a grant upon the shippers, compels a similar result.

[12] The Commission argues in its brief in the *Reddish* case (p. 22, n. 9) that its use of the phrase "shipper's reasonable transportation needs" in its opinion in that case (*R* R. 394) merely reflects a proper limitation of its consideration of shipper needs to those that are not "unreasonable demands bordering on shipper whim which no regulated carrier should be expected to be in a position to meet." If a contract carrier applicant is in fact willing to meet these demands we do not believe they should be totally ignored by the Commission merely because it would be unreasonable for a common carrier to meet them in view of its other responsibilities. The spectre that such consideration would allow the shipper to control the

govern the question of the "effect which denying the permit would have upon the * * * shipper."

In the *J–T Transport* case the court appears to have justified on these grounds its holding that "the Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier" (*J–T* R. 177). We agree with the Commission that this ruling does not properly reflect the Commission's Report. The Commission specifically noted the testimony of the prospective shipper as to its special needs (*J–T* R. 32–33, 34). It concluded, however, on analysis of the operations of U.S.A.C. (the protesting common carrier), in the light of the shipper's specific criticisms, that "there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C." (*id.* at 47), and that "U.S,A.C. is fully able to meet the shippers' needs" (*id.* at 49). These findings, we believe, were clearly within the range of the conclusions the Commission could appropriately reach in view of the detailed record evidence as to

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granting of an application is illusory since the Commission could find such needs outweighed by any demonstrable adverse effect a grant would have on the common carriers. In any event, the Commission admits a shipper "is fully entitled to have his actual needs filled" (Commission brief in No. 53, p. 22, n. 9). Yet its decision in the *Reddish* case recognizes that the common carriers are at a disadvantage "in effecting multiple pickups and deliveries," which surely are "actual needs" rather than "shipper whim[s]."

U.S.A.C.'s operations (see Commission brief in No. 17, pp. 45–52) and the relatively limited evidence introduced by Boeing to support its contentions that U.S.A.C. could not do as satisfactory a job (*J–T* R. 33, 86, 101–104).

The situation in the *Reddish* case is quite different. Here the shippers testified at length as to the inadequacy of existing common carrier service to meet their needs in dealing with many small-order grocery retailers and wholesalers, who normally keep only a 10-day stock of canned goods on hand and therefore require prompt delivery of new orders to replenish their supply as it is exhausted (*R* R. 371, 389). They stated that interlining [13] by the common carriers was inconvenient, damaged the goods and resulted in delay (*id.* at 194, 198–99, 373); that multiple pickups and deliveries by the common carriers were difficult to arrange (*id.* at 190, 194); and that common carrier transportation was slow and the time of delivery uncertain [14]

[13] Where available common carriers are not authorized to deliver to all points at which a shipper has customers, they must "interline" with other carriers, *i.e.*, "tear the shipment down" at some intermediate point, and then reload onto the other carrier in order to deliver the goods. The shipment is thus delayed by the "teardown" and reload process itself, and by the often substantial delay before an appropriate truck, *i.e.*, one headed in the right direction and having space, appears on which to reload the goods. *R* R. 194. Tearing the shipment down and reloading also increases the likelihood of damage to the goods. See *id.* at 373.

[14] Time of delivery is important to the shippers because their customers frequently accept delivery at their loading docks at certain times of the day or on certain days of the week (*R* R. 128; see also *id.* at 178, 245 (special sales)).

(*id.* at 133, 172–173, 194). The protesting common carriers testified as to their service routes and some of them spoke generally of their ability to perform a satisfactory job (*e.g., id.* at 274–79, 287–92, 301–305, 309–312). But the examiner found that "the record indicates that the proposed service [by the contract carrier applicant Reddish] will be more responsive to shipper's transportation requirements" (*id.* at 382).

The Commission, while adopting the examiner's statement of facts as "correct in all material respects" (*id.* at 388) reached a contrary conclusion. It recognized that "protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries" (*id.* at 394). It thought, however, that the shippers, as a result of their failure to experiment with the existing common carrier facilities,[15] had "failed to show that they have been unable to obtain *reasonably* adequate service upon request" (*ibid.*, emphasis added). Thus, even apart from the Commission's failure to give consideration to the rate advantages to shippers using contract carriage (see Point III, *infra*), it seems clear that the Commission has here recognized that there are some advantages to the shippers in the proposed service but has utilized the "reasonably adequate" formula to avoid the necessary determination required

[15] An experiment that, according to testimony by the shipper's witness, would have been so prohibitively expensive that it would threaten the shipper's competitive position in the industry (*R* R. 173); see Point III, *infra*.

by Section 209(b)—namely (to paraphrase the *Schaffer* case), "whether there are benefits that [the proposed] service would provide which are not now being provided by the [protestant] carriers, whether certification of the [applicant] would be 'unduly prejudicial' to the existing carriers, and whether on balance the public interest would be better served by additional competitive service" (355 U.S. at 90).

C. *The Commission's presumption of adverse effect upon existing common carriers.*—The Commission Report in the *J–T Transport* case (*J–T* R. 42) frankly states that both before and after the 1957 amendments it has applied "a presumption that the services of existing [common] carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before." (Emphasis the Commission's.) Consequently, although there was no evidence in the record as to the effect which granting the contract carrier permit would have on U.S.A.C., the Commission stated, "It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority would have an adverse effect upon that protestant" (*J–T* R. 45–46). And in the *Reddish* case, where the examiner had found that "a grant will [not] have any material adverse effect upon the operations of any other carrier" (*R* R. 382), and the evidence showed that the shippers would use private carriage for their less-than-truckload shipments in the event the application was denied (see *R* R. 390), the Commission, in find-

ing that the protesting common carriers would be adversely affected, merely referred in the most general terms to its earlier decision in the *J–T Transport* case (*R* R. 394).

We agree with the courts below (*J–T* R. 176–177; *R* R. 410) that the Commission in so holding committed reversible error. The effect of its applying the presumption, particularly with respect to a factor (effect of a grant on existing common carriers) normally considered "decisive" (*J–T* R. 38), is to define permissible contract carriage in terms of services "not provided by common carriers" despite the elimination of such language from the Section 203(a)(15) definition of a contract carrier during congressional consideration of the 1957 amendments (see p. 26, *supra*). Moreover, the Commission position is inconsistent with the action taken by Congress in adding the requirement to Section 209(b) that the Commission give consideration to five specified factors in passing upon contract carrier applications. For the directive that the Commission weigh the record evidence bearing on these several indicia cannot be squared with its giving decisive force to one of the five on the basis of a conclusive presumption totally unrelated to the facts of record.

The requirement that the Commission consider the five factors stemmed from a proposal originally made, during the course of the hearings on the 1957 amendments, by the Contract Carrier Conference of the American Trucking Association. In offering the proposal, counsel for the conference stressed his view

that the reason the Commission had had difficulty with contract carrier applications in the past "is because they have constantly been looking for some sort of magic formula that can be applied in every case instead of recognizing that it is a question of fact, and that they, as experts, should be able to make the determination" (Hearings, pp. 295–96). He stressed that in proposing standards for consideration of contract carrier applications he was not suggesting any change in the existing standard providing for a grant to qualified applicants unless it would be inconsistent with the public interest or the National Transportation Policy (*id.* at 299). But he stated (*id.* at 299–300):

> there are certain findings that we feel the Commission should make whenever they are considering the question of the interest of the public, and we have tried to spell those out * * * the primary thing that we have always felt the Commission should do in those cases is consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration.

The actual language proposed by the Contract Carrier Conference (*id.* at 304) was virtually identical with that eventually adopted by the Congress, except that there was added the further command that the Commission also consider the effect of a denial upon shippers and the changing character

of their requirements. Neither the House nor Senate Report on the bill commented on the meaning or objective of the new language (see S. Rep. No. 703, 85th Cong., 1st Sess., 6; H. Rep. No. 970, 85th Cong., 1st Sess., 4). However, Senator Smathers, Chairman of the Subcommittee of the Senate Committee on Interstate and Foreign Commerce which handled the bill, inserted an explanation of the bill into the Congressional Record indicating, *inter alia*, that in adopting the new language "the Committee is proposing to give the Commission more helpful standards than are contained in the present law" (103 Cong. Rec. 14036).

The district court in the *J–T Transport* case (*J–T* R. 176), appears to have thought it significant that the 1957 amendment calls for Commission consideration of the effect of a grant upon the "services" of the protesting carriers (whereas a potential denial of the application was to be judged in terms of its effect upon "the applicant and/or its shipper" directly). But regardless of whether the Congress consciously intended to draw a distinction between the effect of a grant upon the common carriers and upon their services, Congress plainly intended the Commission's evaluation to be made on the basis of a reasoned analysis in which the agency brings to bear its expertise in the field in the light of the facts of record, rather than by some *a priori* presumption. See *Schaffer Transportation Co.* v. *United States, supra,* 355 U.S. at 91; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 70. This, of course, does not mean that the Commission, in making its determina-

tion, cannot continue to give great weight to the effect a proposed grant might have upon the services of the common carriers. And we agree with the Commission that there is no reason why consideration of the effect the grant might have upon the services of the common carriers should not take into account potential as well as existing traffic. But the requisite balancing of the conflicting interests of applicant and shipper on the one hand and common carriers on the other must be made in the light of a reasoned and fully articulated consideration of the actual circumstances disclosed by the record.

The Commission in its *J–T Transport* brief (pp. 60–62), suggests that the Commission has in fact made just such a reasoned evaluation in determining, in the light of its experience in the field, that protection of the essential common carrier services requires denial of contract carriage applications wherever existing common carriers are willing and able to provide for shipper needs. The trouble with this argument is twofold: it assumes (without disclosing the evidentiary basis for the assumption) that the services of the common carriers will in fact be impaired whenever they fail to receive traffic they are willing and able to carry, and it also assumes that any such impact necessarily outweighs the advantages to the public flowing from a grant of the application. Neither of these assumptions can withstand analysis.

Thus, as the court below pointed out in the *Reddish* case (*R* R. 406, 410), in many situations the choice before the shipper may lie between utilizing the

services of the contract carrier or going into private carriage on its own. In such situations the common carriers may be no better off as a result of a denial of the application than if it had been granted. Where, as in the *Reddish* case, the record clearly indicates this is the situation, it is difficult to see how the Commission's application of the contrary presumption to deny the application serves the National Transportation Policy, which certainly does not look toward the enhancement of the wholly unregulated private sector of the motor transport industry. This does not mean, as the Commission suggests in its brief in the *Reddish* case (pp. 22 n. 9, 26), that its decisional processes are at the mercy of the shipper's fiat. Obviously an expression of shipper intent to use private transportation if the application be denied can be tested against what it and other similarly situated shippers have done in the past as well as by an evaluation of the actual costs and service consequences of the shippers' resorting to private carriage.[16]

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[16] *American Trucking Ass'ns* v. *United States*, 364 U.S. 1, 18 to which the Commission refers (*J–T Transport* Br. 55), supports this view. There this Court rejected a contention that a shipper's expressed disinclination to use the facilities of the protestant carriers (the shipper having stated that if it could not use the services of the railroad-owned trucker it contemplated using the services of another independent motor carrier or to provide its own transportation) deprived the protestants of standing to challenge the grant to the railroad subsidiary. The decision thus suggests that the Commission would be free to evaluate the actual likelihood of potential shipper use of common carriers despite their announced rejection of the possibility.

Even in circumstances where the common carriers could expect or hope to secure the shipper's business if the application for contract authority be denied, they may well be in such a strong financial condition that the impact of a grant upon their services would be minimal or nonexistent.[17] And, in a situation like that presented in the *J–T Transport* case, where both the contract carrier applicant and the common carrier protestant are engaged in highly specialized operations for a limited number of large shippers, the maintenance of adequate common carrier services might be of much less significance than in dealing with the more general types of common carriage upon which smaller shippers must necessarily rely. All such considerations are obscured when the Commission substitutes a conclusive presumption for factual analysis.

We do not suggest that the necessity for a determination based upon a balanced evaluation of all of the statutory factors in the light of the actual circumstances of record precludes the Commission from arriving at certain general conclusions as to the manner in which it expects to determine various types of contract carrier applications. The Commission need not start from scratch in every case

[17] The Commission (*J–T Transport* Br. 62) points to certain factors which it believes indicate that U.S.A.C. might find the Boeing business valuable in improving or protecting its service capabilities. These are exactly the types of factors the Commission might have considered as part of a comparative evaluation of the actual impact of the grant on U.S.A.C. But it did not do so.

but, in our opinion, may announce the action it proposes to take in various types of situations in the absence of a positive showing indicating the propriety of a contrary result. Moreover, the Commission necessarily has broad discretion in drawing reasonable inferences from the facts of record upon such issues as the probable effect of a grant upon the services of protesting carriers. But the Commission is obligated under the Act to pass upon the various factors governing its decision under the statutory standards and in the light of the concrete situation before it rather than on the basis of a single uniform presumption that might or might not have validity in the particular case. This, we are convinced, it has not done in either of the cases here.

III

THE ALLEGED ERRORS IN THE COMMISSION'S REFUSAL TO CONSIDER RATE ADVANTAGES OF CONTRACT CARRIAGE

In the *Reddish* case the contract carrier applicant proposed to provide a less-than-truckload service to three shippers at a materially lower cost than the rates offered by the protesting common carriers for the same service.[18] The Commission noted that the shippers believed that the availability of lower rates was crucial to their business survival, *i.e.*, that they would be forced out of business if they were required to pay "prohibitive" common carrier rates (*R* R. 390), and finally concluded that shipper support for the appli-

[18] Common carrier rates are at times double or triple those of the contract carrier rates (*R* R. 193–195; see also *id.* at 83–84, 353).

cation rested entirely upon their desire to obtain lower rates (*id.* at 395). But in evaluating the effect of a denial upon the shippers and in reaching its ultimate determination to deny the application, the agency swept aside all cost considerations, holding that "[t]his is not a sufficient basis to justify a grant of authority to a new carrier" (*ibid.*). In the Commission's view, "[i]f the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under [other] appropriate provisions of the act" (*ibid.*).

The district court, noting that "Congress has declared one of the goals of our national transportation policy is to promote 'economical' service" (*R* R. 409), concluded that "lower costs in the form of rates may [not] be ignored in determining [under Section 209 (b)] the effect denying the permit would have upon the shippers" (*ibid.*). Stressing that it was not holding that 'evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers" and that "[m]ere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded" (*ibid.*), the court concluded:

> * * * where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the

> record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. [*Ibid.*]

It is the position of the United States that the opinion of the district court, rather than that of the Commission, correctly states the law in this area. In our view, both the National Transportation Policy and the specific language of Section 209(b) require the Commission to weigh cost considerations where the record indicates that the lower proposed costs of contract carrier service result from the intrinsic nature of that service rather than from the mere willingness of the applicant to accept a lower rate of return than that specified by the common carriers in their tariffs. We also agree with the district court that the record in the *Reddish* case does in fact indicate that the applicant's proposed lower rates resulted from "economies and advantages inherent in contract carrier operation" (*R* R. 409), at least to an extent requiring consideration and analysis by the Commission going far beyond the out-of-hand rejection of the issue that characterized the Commission's action here.

A. *The Commission's policy of not considering rate advantages.*—As the Commission points out in its brief in the *Reddish* case (p. 29) its policy of refusing to consider the level of rates in determining whether a motor carrier application is consistent with the public interest and the National Transportation Policy is of "long standing". In *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 89 this Court rejected this "well established" policy as applied to a motor carrier

application opposed by railroad common carriers. Holding in the context of this motor-rail competition that the "ability of one mode of transportation to operate with a rate lower than competing types of transportation is precisely the sort of 'inherent advantage' that the congressional policy [embodied in the National Transportation Policy] requires the Commission to recognize"[19] (355 U.S. at 91), the Court did not pass expressly upon the validity of the Commission's practice where the competition is between two types of motor carriage (*id.* at 92).

The *Schaffer* case is, of course, controlling here if contract carrier motor transport constitutes a different "mode" of transportation from common carrier motor transport within the meaning of the National Transportation Policy. That such is the case was argued by Reddish and the Contract Carrier Conference in the court below. We agree with the district court (*R* R. 403) that it is unnecessary to reach this question in order to decide the instant case, since the National Transportation Policy is not limited to intermodal economic advantages, nor is the language of Section 209(b), requiring consideration of the effect of a denial upon shippers, so limited.[20]

The National Transportation Policy, by which the Commission is to be guided in administering the Act, in addition to requiring the recognition and preserva-

[19] See *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

[20] In so arguing, we do not concede that the "inherent advantages" clause of the National Transportation Policy is not applicable to competition between contract and common carriers engaged in motor transport.

tion of the inherent advantages of each mode of transportation, provides for the promotion of "safe, adequate, economical, and efficient service and * * * sound economic conditions in transportation and among the several carriers" (see p. 61, *infra*). The Commission itself has recognized in its decision in the *J–T Transport* case that these provisions of the National Transportation Policy are pertinent to the consideration of contract carrier motor transport applications opposed by existing common carriers and that it may not ignore "any matter which might affect the good of the national transportation system as a whole" (*J–T* R. 43). While this statement was made in justification of the Commission's concern that due consideration be given to the importance of adequate common carrier facilities in maintaining a healthy transportation system, it is equally applicable here. For the National Transportation Policy cannot be a one-way street in which only the advantages flowing to the public from common carriage are to be considered but those stemming from contract carriage are ignored. Consequently, if either type of motor carriage enjoys inherent characteristics of economy and efficiency permitting it to operate at lower costs and rates, the policy of the *Schaffer* case becomes applicable regardless of whether separate "modes" of transportation are involved. Specifically, to the extent that the lower rates of contract carriage for the less-than-carload traffic involved in this case can fairly be

said to result from the greater inherent economy and efficiency of contract carriage as opposed to common carriage, we submit that the National Transportation Policy requires the Commission to weigh this factor before reaching its decision.

If there were any doubt about the validity of this position prior to 1957 we believe it was removed by the addition of the specific provision of Section 209(b) directing the Commission to weigh the impact on the shipper of denying a contract carrier application. Nothing in the language of Section 209(b), requiring consideration of "the effect which denying the permit would have upon the * * * shipper," suggests that Congress intended to limit such consideration to the physical nature of the services the shipper would lose as contrasted with their cost advantages. On the contrary, it seems self-evident that a shipper is adversely affected whenever the denial has the effect of making him pay the higher rather than the lower rates. As the district court suggests (*R* R. 409), where rate advantages to the shipper result from mere rate-cutting or profit-shaving, the Commission may justifiably find that such advantages to the shipper are outweighed by the effect of such practices upon the protesting carriers. But where the record indicates that actual economies and efficiencies of operation are involved (and particularly where, as here, the claim is that the shipper could not survive if he is required to transport his goods at the higher

common carrier rates), the adverse effect upon the shipper of denying the application must, we submit, be weighed under Section 209(b).

It is no answer for the Commission to say—as it also did in the *Schaffer* case (see Commission Brief in No. 20, Oct. Term, 1957, pp. 26–27)—that "[i]f the shippers believe that the rates of presently authorized [common] carriers are unjust or unreasonable they should seek relief in actions against these carriers under appropriate provisions of the act" (*R* R. 395). Although this remedy might be effective in some situations, notwithstanding the great time and expense of prosecuting such a proceeding to a conclusion, a rate action is an illusory remedy where, as in the *Reddish* case, the proceedings would involve shipments from four points of origin to hundreds of destinations in over thirty states and via some dozen carriers. Moreover, the relevant question in passing upon a contract carrier operation is not the reasonableness or unreasonableness of existing common carrier rates, which may well be reasonable and still be significantly higher than the rates that an efficiently operated contract carrier can profitably offer, see Hearings, p. 214. Nothing in either the National Transportation Policy or the express language of Section 209(b) suggests that such genuine advantages are to be ignored in considering a contract carrier application because of

the bare possibility that in some cases shippers might be able to secure relief in a rate proceeding.[21]

There remains for consideration the Commission's contention that appraisal of a contract carrier's proposal to provide lower rates would open the door to challenge of the lawfulness of the proposed rates by the protesting carriers, thus converting the application proceeding into a complex and prolonged rate proceeding (Commission's *Reddish* brief, pp. 31–32). While such considerations could not in any event justify ignoring the statutory mandate, we perceive no merit in the suggestion on its own terms. For one

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[21] The two cases (other than the *Schaffer* case) cited by the Commission in support of its contention that the courts have given approval to its policy of ignoring cost factors, are clearly not in point. *American Trucking Ass'ns* v. *United States*, 326 U.S. 77, 86 (which the Commission also cited for this proposition in its *Schaffer* brief (at pp. 27–28)), and *Railway Express Agency, Inc.* v. *United States*, 153 F. Supp. 738, 741 (S.D.N.Y.), affirmed, 355 U.S. 270, both stand only for the proposition that the Commission, in approving applications, does not have to consider allegations that the applicants have engaged in, or propose illegal tariff provisions, but may defer such consideration to other appropriate post-certification proceedings. They certainly do not hold or suggest that the Commission may ignore inherent cost advantages which the applicant has over the protestants. In fact, in the *Railway Express* case the court put aside the protestant's contention that the Commission had placed improper reliance on the applicant's lower rates, since the Commission had granted the application "on the basis of evidence showing a more efficient service, *at a lower cost* and of a type not presently offered to shippers" (153 F. Supp. at 742, emphasis supplied).

thing, it is already established that the Commission is not required to pass upon such challenges to lawfulness of proposed fares in a certificate proceeding (see note 21, p. 53, *supra*). In addition, we note that other regulatory agencies have experienced no difficulties in taking comparative rate factors into account in determining applications for new transportation authority.[22] The issue presented to the Commission is not whether the particular rates proposed by the contract carrier applicant are lawful within the meaning of Section 218 of the Interstate Commerce Act but rather whether the proposed service involves economies and efficiencies in cost resulting in rate advantages to shippers that should be weighed in the balance in determining whether the application should be granted. No unduly elaborate cost analysis is necessary (if indeed any more than a qualitative appraisal is called for) in determining whether contract carrier - common carrier rate differentials stem from such factors, particularly since comparative rather than absolute levels will be in issue. As this Court has indicated elsewhere, not every Commission inquiry into comparative rate levels need assume the complexity of a fully developed rate proceeding. See *King* v. *United States*, 344 U.S. 254, 275.

B. *The character of the rate advantages proposed here.*—The Commission asserts in its brief in the *Reddish* case (p. 35) that "there is not a scintilla of

[22] See, *e.g.*, *New York-Mexico City Nonstop Service Case*, 25 C.A.B. 323, 326-27 (1957); *New York-Chicago Service Case*, 22 C.A.B. 973, 978 (1955); *Additional Service to Puerto Rico Case*, 12 C.A.B. 430, 431-33 (1951).

evidence in the record which would establish that the proposed lower rates result from economies, advantages, or more efficient operation of Reddish's contract carrier service." If by this the Commission means that there are no quantitative analyses of the comparative costs of operation of Reddish and the common carriers, this is quite true: since Reddish was not an existing contract carrier, such an analysis (in the extremely unlikely event that the Commission would have permitted it to have been made [23]), would have been difficult, if not impossible. But the absence of such analyses does not mean that the evidence of record, considered in the light of well-established principles of transportation economics, did not compel the Commission to find, as the district court found, that the lower rates Reddish proposed here "result from economies and advantages inherent in contract carrier operation" (*R* R. 409). For the record contained more than sufficient evidence as to the contrast between the existing and proposed operations from which the Commission could properly determine that the rate differentials reflected actual cost savings.

The record shows one of the principal economies incident to contract carriage of the type proposed by

[23] As the Court observed in the *Schaffer* case (355 U.S. at 91), the Commission "has always considered rates irrelevant" in passing upon an application. See also *Southland Produce Co.*, 81 M.C.C. 625, 628 (level of rates not a factor the Commission may consider in determining whether service is in public interest, except in embargo case); *Interstate Dress Carriers, Inc.*, 77 M.C.C. 787, 791; *Carl Subler Trucking, Inc.*, 77 M.C.C. 707, 713.

Reddish is that small-order shipments by several shippers to scattered customers can more frequently be transported in consolidated loads (*R* R. 107, 128, 389; see also *id.* at 190, 194). By carefully scheduling and routing truck movements to meet customer and factory requirements,[24] the shipper and contract carrier can arrange to utilize the full load capacity of the truck much more successfully than could the common carrier and his shippers.[25] The operating costs of the contract carrier would drop in proportion to this increase in his "load factor."[26]

A further economic advantage of contract carriage is the elimination of the cost of interchange with connecting carriers (so-called "interlining"), that would be involved in less-than-truckload common carriage to

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[24] This is the practice of the private shipper competitors of Reddish's supporting shipper Steele, who own their own trucks and are thus wholly integrated by ownership into the transportation of their products (*R* R. 401–02).

[25] Common carriers have schedules to maintain and other customers whom they are required to serve. Section 216(d) of the Act, 49 U.S.C. 316(d), forbids common carriers to give any shipper an undue or unreasonable preference or advantage over other shippers.

[26] "A load factor is a direct measure of the extent to which the equipment operated by a motor carrier is being utilized. It is calculated by obtaining the ratio of loaded ton-miles per route-mile to capacity ton-miles per route-mile. A low load factor generally results in * * * a low rate of return. * * * [C]ommon carriers operating on regular schedules may have lower load factors than carriers which conduct nonscheduled operations." Hudson & Constantin, *Motor Transportation* 168 (1958); see Hearings, p. 27 (statement of ICC Chairman Clarke). In other regulatory fields, see, *e.g.*, *National Coal Ass'n* v. *Federal Power Commission*, 247 F. 2d 86 (C.A.D.C.); *New York-San Francisco Nonstop Service Case*, CAB Order E–14412, pp. 12, 14 (Sept. 2, 1959).

many, if not most, of the customers of Reddish's supporting shipper Steele (see note 13, *supra*, p. 37) (*R* R. 373; see also *id.* at 194). Use of consolidated load shipments over a prearranged route which the contract carrier could use but which could not be served by a single common carrier eliminates the necessity for the unloading from one carrier, storing the shipments, and reloading them onto another carrier. Moreover, contract carriage operations such as those proposed by Reddish eliminate any need for terminal facilities, whether for pickup and consolidation of loads or for interlining. Thus, contrary to the statement in the Commission's *Reddish* brief at p. 35, n. 19, Reddish has no terminals or terminal costs [27]—unlike the protestant carriers most of which, as the Commission points out (*Reddish* brief, p. 35, no. 19), have to bear the expenses of more than one terminal.

Because of these and other intrinsic differences [28]

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[27] See *R* R. 31, 55; *1960 Annual Rep. of E. L. Reddish*, ICC Docket No. 117,391 (Motor Carrier Annual Rep. Form B, Class II Motor Carriers of Property), p. 31.

[28] According to a leading transportation expert,

"There are certain differences in operations which are reflected in operating costs between contract carriers and common carriers. Contract carriers usually have no terminal facilities for platform handling of freight because they make a contract only for volume freight—which means, in effect, truckload lots. They go to the shipper's plants, load the freight, and take it directly to the consignees; and, therefore, they have no need for terminal facilities for freight handling. * * * The average revenue per ton-mile of contract carriers is consistently below that of common carriers because of differences in services and costs."

Taff, *Commercial Motor Transportation* 110 (rev. ed.); accord, Landon, *Transportation* 233–234.

between the costs of common and contract carriage, which the Commission itself has frequently recognized,[29] the agency could not (as in fact it did not) find on the record here that the rate differentials that the shippers deemed so significant as to foreclose resort to common carriage were unrelated to the inherent economies and efficiencies of contract as contrasted with common carriage. Of course, on remand and in the light of an adequate new record, the Commission may conclude that Reddish's apparent cost advantages are illusory,[30] and it has broad discretion in evaluating the significance of any cost advantages. But where, as here, all of the circumstances of record

[29] See, *e.g.*, Hearings, p. 23 (testimony of ICC Chairman Clarke); *Contract Minimum Charges from and to Baltimore, Md.*, 32 M.C.C. 273, 283 (1942); *New England Motor Rate Bur., Inc.* v. *Lewers*, 30 M.C.C. 651, 663–64 (1941). Cf. *Roofing from Elizabeth, N.J., to Norwood, Mass.*, 51 M.C.C. 258, 261 (1950); *Contracts of Contract Carriers*, 1 M.C.C. 628, 630 (1937).

[30] In such a reconsideration the factors mentioned at pages 35–36 of the Commission's *Reddish* brief might well be relevant. But so might be the evidence of Reddish's successful operation at the lower rates under the temporary authority he has enjoyed. According to Reddish's annual reports, which he is required to file with the Commission under 49 U.S.C. 320, 49 C.F.R. 205.1a, 205.13, he had been operating well in the black with a very favorable "operating ratio" of expenses to revenues. See *1960 Annual Rep. of E. L. Reddish*, I.C.C. Docket No. 117, 391 (Motor Carrier Ann. Rep. Form B Class II Motor Carriers of Property), at 30; *June 30, 1961, Quarterly Rep. Revenues, Expenses, and Statistics*, ICC Docket No. 117,391 (Form QFR-II), at 1; March 31, 1961, *Quarterly Rep. Revenues, Expenses, and Statistics*, ICC Docket No. 117,391 (Form QFR-II), at 1. Copies of these reports are lodged with the Clerk of this Court.

indicate that there were, in fact, substantial cost savings in the type of contract carriage proposed by Reddish, which could properly be reflected in rates to the shippers, the Commission may not refuse to give any consideration to the claim.

CONCLUSION

The 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act plainly require the Commission, when it passes upon applications for contract motor carrier permits, to weigh and carefully balance against one another each of the several factors specifically enunciated in Section 209(b), and fully to articulate its reasoning in its findings. The amendments seem clearly to contemplate, moreover, that all relevant evidence will be considered in appraising these factors and that the burden of making a record on each of them lies with the party best able to produce the evidence. Finally, the amendment to Section 209(b) requires that the Commission consider the shippers' needs on which a contract carrier application is based in terms of their own distinct and specialized character.

Within this framework, we think it entirely proper for the Commission to consider the willingness and ability of existing common carriers to provide the service proposed by the applicant; and, to the extent the courts below ruled to the contrary, we think they erred. With respect to the contention that the Commission improperly imposed upon the applicants the burden of establishing the inability of existing common carriers to meet the shipper needs at issue, we do

not believe the Commission committed this error in the *J–T Transport* case; in the *Reddish* case, the Commission's action on this point is not altogether clear, related as it is to the Commission's plain error in evaluating shipper needs in general terms of "reasonableness" rather than in terms of their own distinct character. We believe that in both cases, the Commission erred in reaching the conclusion that the services of protesting common carriers would be adversely affected by the grant of an application on the basis of a presumption that any loss of even potential traffic would have a harmful effect upon protestants' services. Finally, we think the Commission erred in refusing, in the *Reddish* case, to consider rate advantages offered by the contract carrier applicant.

Accordingly, the United States respectfully urges this Court to vacate the judgments of the district courts and to direct the entry of judgments setting aside the orders of the Commission in these cases and remanding them to the Commission for further proceedings consistent with the principles set forth above.

Respectfully submitted.

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APPENDIX

TEXT OF STATUTE INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding 1, 301, 901, and 1001:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 303(a)(15):

SEC. 203. (a) As used in this part—

* * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, as amended, 71 Stat. 411, 49 U.S.C. 309(b):

SEC. 209.

* * * * *

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent

authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided,* That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within

the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

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